96-98

From: John Leslie
To: Mike Powell
Date: 2/5/03 3:49PM
Subject: comments on CC 96-98. 98-147, 01-338

New Hampshire ISP Association
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February 5, 2003

The Honorable Michael **K.** Powell
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20054

Re: Triennial Review of the Commission's Unbundling Rules
CC Docket Nos. 96-98, 98-147, 01-338

Dear Chairman Powell:

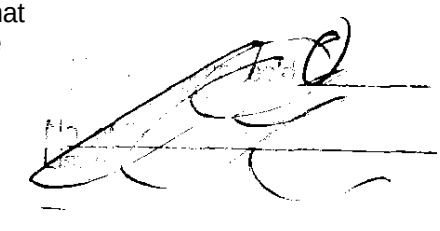
Commissioner Kevin Martin made a number of good points in his Remarks to the 20th Annual PLC/FCBA Telecom Converence on December 12th. However, we are concerned lest the Commission actually accept his proposal to make "new investment and deployment of advanced network infrastructure" the top priority of the Commission.

The Federal Communications Commission is charged by Congress to carry out the provisions of federal law, not to produce a particular outcome. A reading of Communications law (law actually passed, that ***is,*** not bills like Tauzin-Dingell which never made it to the President's desk) shows that Congress intended a structure where large numbers of competitors could operate simultaneously, and in which the particular services offered would evolve over time.

Commissioner Martin correctly notes that a number of telecommunications companies are operating under frightful debt loads. But Congress nowhere charged the FCC to consider debt loads -- instead they set up Bankruptcy Courts for that purpose. **We** would like to point out -- in case it hasn't come to your attention --that our members are not operating under heavy debt loads; and this is typical of the thousands of small-to-medium-sized Internet Service Providers whose business model did not include a national footprint.

There is absolutely no legal justification for the Commission to choose which providers should be winners and which should be losers -- least of all to make such a choice by subsidizing a business model thoroughly shown to be unprofitable.

Most independent studies -- note in particular the study commissioned by the state of New Hampshire at http://www.technologynh.com/ -- find that supply of services is not the problem: instead consumer resistance to the current offerings is causing slower returns on investment than business models called for.



We hasten to point out that the business models of our members have never hinged on overly-optimistic take rates -- we know our current customers, and much of our new business is referrals from the current customers. We urge you and the other Commissioners not to choose a regulatory path which would put **us** at a disadvantage.

Commissioner Marlin correctly points out the problems of unstable regulatory frameworks. We heartily concur that such problems exist. But such problems cannot be corrected by major changes in definitions by the Commission. Indeed, it has been shown that it takes upward of five years **for** such issues to work their way through the courts; and it can take another five years for the rulings of the courts to work their way into the routine operations of the Commission. If you accept stability as a goal, you must eschew major changes in direction.

Commissioner Martin correctly points out that uncertainty about return on investment is a serious disincentive to investment. But, frankly, there is nothing the Commission can do to eliminate uncertainly; thus you should not even consider such as a goal. There is certainly room for argument whether TELRIC pricing correctly compensates ILECs, especially as regards long-range depreciation; but these questions need to be resolved in the context of TELRIC proceedings at the individual state Commissions.

Commissioner Martin is concerned whether TELRIC provides sufficient return for new investment. His concerns are valid. But all TELRIC pricing we are aware of has been worked out in proceedings where the ILEC had full voice; and in most cases the ILEC has voluntarily agreed to the pricing. Changing the rules after the fact weakens the whole process; and the Federal Communications Commission should be most extremely wary of doing *so.* Instead. they should clearly express their concerns to the individual state Commissions, and charge those Commissions to consider what adjustments might be in order.

Commissioner Martin believes that TELRIC fails to accurately measure risk. We must agree; but we question whether the Commission has any legal basis for setting out to assess risk. Rather than assessing risk, the Commission should explore pricing schemes which eliminate risk, by fully compensating the ILEC for marginal costs of new infrastructure.

Commissioner Martin claims to believe that "it is not 'necessary' for a competitor to have access to a new fiber loop." We are puzzled. Where a new fibre loop is the only path from collocation space (which Martin agrees is "necessary") to a potential customer location, any definition we can imagine would conclude some access is "necessary". (Even if it weren't "necessary", its absence would most surely "impair" the ability to compete.)

Commisioner Martin is certainly entitled to believe that not all uses of ILEC facilities are "necessary": and we accept that as part of the process of interpreting and applying the law. *But* **we wish he** (and any other Commissioners who have similar feelings) would get out to the boondocks and ask actual residents of New Hampshire what they think of multiplying the number of wires on each telephone pole. Please accept (tentatively. until you can ask for yourself) our assurance that the residents of New Hampshire consider this "silly" or worse.

In the case of fibre, there is literally no technical justification for ruling against any access. The bandwidth capability of fibre is so much greater than that of copper that there could always be schemes based on different photon wavelengths to ensure that the a single fibre could serve multiple uses with no danger of interference.

Commissioner Martin also claims to believe "the Commission should freeze the service capacity level that must be made available". We are considerably more puzzled. In a number of places in the 1996 rewrite, Congress charged the Federal Communications Commission to see to it that the capabilities of telecommunications services increased as demand called for it. This particular "belief" seems to us to be an attempt to accomplish the failed Tauzin-Dingell objectives in the absence of legislation. Hopefully we don't need to remind you that you are not charged to hold your fingers to the wind and guess the direction that future legislation might take..

Commissioner Martin is bothered by the differing treatment of Cable Internet versus DSL Internet. We agree that the blanket definition of Cable Internet as an "information service" has led to some confusion; but we hasten to point out that the problems stem from making a blanket definition in a hasty manner, and those problems are likely minor in comparison to the problems which would ensue from another hasty blanket definition.

The particulars of Cable Internet make it quite reasonable that -- for most purposes --the service should be considered an information service. The problems arise from not considering the question of what underlying telecommunications service is being used. When we commented on that issue, we recommended caution in trying to define the telecommunications service being used, because of technical problems that made any sharing problemmatic. We apologize if we somehow gave the impression that access to fibre wavelengths (or whole fibres) was inappropriate for the Commission to require. We didn't believe that question was included in the docket.

Commissioner Martin sets out three possibilities for reconciling the treatment of Cable Internet and DSL services. We hasten to point out that these two services are by no means identical; and further point out that we see no Congressional mandate to determine whether such services should be treated similarly; and lastly point out that Congress certainly didn't make your job easy if you set out to treat them in similar ways.

Rather than choose among Commissioner Martin's suggestions (and we will refrain from adding to his list), we most seriously recommend just saying "No" to such an impractical task. The time may well come that the Commission is forced to revisit the question of open access to elements of Cable service due to the evolving nature of the services offered; but your plate is full enough without adding second-guessing the future to your job description,

For DSL service, the situation is entirely different. Though there are similarities between the retail offerings of Internet service via Cable and DSL. the DSL offering are based on a clear telecommunications service. being the transmission of particular frequencies over clearly

defined copper paths. That telecommunications service, whether or not it is currently tariffed, is what competing Internet Service Providers need access to.

Given access to those frequencies on those paths, we are entirely prepared to offer information services to current customers and to others that are referred by them. The Commission needn't agonize over what "incentives" are needed for a task you aren't even charged to accomplish. The Commission needn't run the risk of embarrassment when it turns out that several-year-old "incentives" have accomplished quite the opposite of the intended result, leading instead to buildout in areas already well-served and no buildout in underserved rural areas.

We ask for access to unbundled telecommunications services. If the Commission simply does nothing, we'll (eventually) get it from the state Commissions. But if the Commission follows the actions recommended by Commissioner Martin, we'll be back to 1996--with prospects being far worse for accomplishing what we need in the next seven years.

Sincerely yours,

Carol Miller, President John Leslie, Secretary
for the New Hampshire ISP Association
http://www.nhispa.org

CC: Kathleen Abernathy, Michael Copps, Michael Copps, KM KJMWEB. Commissioner Adelstein